Withdrawing legislative proposals at a whim? - The case of the CAP reform

Op-Ed

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The debate on the adoption of the reform of the Common Agricultural Policy (CAP) has taken a bitter turn in the last few weeks. Several environmental NGOs as well as the Greens group at the European Parliament publicly expressed their concerns with the compatibility of the new CAP system with the objectives defined by the European Green Deal. The Commission shared part of those concerns and seemed unhappy with the negotiating positions of the Council of the European Union and the European Parliament, to the point that Vice-President Timmermans suggested in an interview that the Commission could even consider withdrawing current proposals, which were presented in 2018 by the Juncker Commission. The German Presidency of the Council, other national ministers and several EP members reacted bitterly to Timmermans’ suggestion, and the Commission quickly backpedaled. President von der Leyen argued that while withdrawal of a legislative proposal ‘is always a legal and institutional possibility’, the Commission was not considering it, and was confident that the proposed regulations could have been adequately improved during the legislative process.

Leaving aside the substantive debate – whether the proposals *should* be withdrawn – we want to discuss (expanding on the brief reflections that one of us has already expressed here) whether a decision to withdraw in these circumstances would be legal, and more generally the limits to the Commission’s power to withdraw legislative proposals. In what follows, we aim to show that there are different scenarios in which the Commission may lawfully withdraw its proposals and that the precise threshold to be met in each of these scenarios is arguably different.

An implied power to withdraw legislative proposals?

The starting point of an analysis of the Commission’s power to withdraw its legislative proposals starts from the text of the EU Treaties.

However, a cursory reading of the relevant provisions immediately reveals that no such power is explicitly conferred on the Commission. Article 17(2) TEU and Article 293(2) TFEU only explicitly refer to the power to make and the power to amend (legislative) proposals. If a power to withdraw proposals exists it must then be an implied power, that is, either implied through a broad conceptualisation of the power to make or amend proposals, or else implied as a distinct power next to the powers to make and amend proposals.

For a long time, this legal question was purely academic: the Commission routinely withdrew (outdated) proposals, but as none of the other EU institutions or Member States took issue, the limits to the implied power to withdraw proposals remained untested. In 2013, however, the Commission withdrew a proposal against the wishes of the co-legislators, following which the Council of the EU brought a case against them before the Court of Justice of the EU, challenging the Commission's decision to withdraw the proposal. In that *Macro-Financial Assistance* (*MFA*) case (C-409/13), the Court, for the first time, had the opportunity to confirm the existence of the Commission's power to withdraw proposals and to sketch the limits governing that power. As we will show however, the current scenario concerning the CAP proposals is not entirely comparable to the one in *MFA*. Instead it would be a third scenario, in addition to the two scenarios which can be identified in *MFA*. While that third scenario is subject to the same general logic, a different 'triggering threshold' arguably applies.

The Two Scenarios following the Macro-Financial Assistance case

The question in *MFA* was whether the Commission has the power to withdraw a proposal even after the co-legislators have reached an informal agreement on a compromise text. All the institutions agreed that the Commission could withdraw proposals for 'administrative' reasons, for example when proposals become obsolete or when the legislators have ignored a proposal for years. As in those cases there is an agreement between the EU institutions that these proposals no longer serve a purpose, the Commission routinely withdraws them and will announce this in its yearly work programme (see for example Annex IV of the 2020 Work Programme). Yet, the Commission had for a long time also claimed that it has the power to withdraw proposals based on substance (see answers to Questions 2422/86 and E-0858/01). The Court in *MFA* ultimately confirmed this, but subjected this power to strict requirements:

i. the power can only be exercised up until the Council of the EU has acted (paragraph 74);
ii. the Commission must give reasons for the withdrawal (paragraph 76);
iii. in substance, the Commission must be able to show 'cogent evidence or arguments' (paragraph 76) of an objective need to withdraw the proposal and;
iv. the Commission must respect the principle of sincere cooperation (paragraph 83).

In the specific *MFA* case, the Court found that there was an objective need to withdraw the proposal, because the amendments that the co-legislators were contemplating distorted the proposal in such a manner that the achievement of the objectives pursued by the proposal was prevented, ultimately depriving the proposal of its *raison d'être* (paragraph 83). In those circumstances, the Commission was indeed authorised to withdraw its proposal.

Following *MFA* there are therefore at least two scenarios in which the Commission may validly withdraw proposals: when proposals become obsolete and when proposals are unduly and fundamentally altered by the (co-)legislator(s).

Coming back to the current CAP scenario, there is no question that it is different, and that it cannot be directly answered on the basis of the Court's earlier findings. In the current situation, the key issues stem from the original Commission proposal, and not from amendments planned by the other institutions. Clearly, the same four requirements would also apply to this scenario. But what should be the precise threshold for triggering the power? Below we will develop two brief lines of argument, in favour alternatively of a higher and a lower threshold than the one resulting from *MFA*.

Withdrawing the CAP proposals requires a higher threshold to be met

To appreciate why a higher threshold should arguably be met in order for the Commission to lawfully withdraw its 2018 CAP proposals, it is useful to go back to the logic underlying the Court's decision in *MFA*. As noted, in *MFA* the Court took the middle ground between the position advanced by the Commission, which argued that the rules governing its right of withdrawal fully mirror those governing its right of initiative, and the Council's, which reduced the role of the Commission to that of an honest broker. While only the AG was explicit on this, the Court's decision was thus also inspired by a concern to uphold the Community Method. The Court had to tread carefully since endorsing the Commission's position would have resulted in a significant limitation on the powers of the two institutions with greater democratic legitimacy. Even the Court's middle ground was criticised as 'not taking democracy seriously'. Indeed, the only reason why the Commission should be allowed to subvert a compromise reached between the two institutions that incarnate the EU's dual democratic legitimacy (see Article 10 TEU) is when such a compromise would fundamentally go against the general interest of the EU which, under the Community Method, it is the Commission's task to uphold.

Applying this logic to the 2018 CAP proposals reveals why the threshold is higher. If the Commission would want to withdraw its proposals it must mean that they suffer from such fundamental deficiencies that they cannot be remedied by the Parliament and Council of the EU any longer in the three readings under the OLP. Yet under the principle of sincere cooperation, the Commission should give an opportunity to the co-legislators to rectify the problematic aspects of its proposal or show that these are not rectifiable beyond any doubt. Of course, a new Commission can have new policy priorities but this cannot give a new Commission a free pass to withdraw proposals at will. Instead

the Commission would have to show that less far-reaching action, such as simply amending the proposal, would not be effective to uphold the general interest.

In addition, the fundamental deficiencies can arguably only result from two causes giving rise to an 'objective need' to withdraw: either the current Commission believes that its predecessor manifestly and fundamentally misconceived the EU's general interest when drawing up the original proposals, which would equate to a misuse of powers by the preceding Commission; or the Commission believes that the political, economic and social context has fundamentally changed between 2018 and now. Under the duty to state reasons the Commission would thus first have to demonstrate the existence of either of these two situations and it must show the impossibility for the co-legislators to salvage the proposal.

Having to show that your institution's original proposal is fundamentally deficient and unsalvageable (either because of a misuse of powers or because of fundamentally changed circumstances) then arguably constitutes a higher threshold than having to show that certain amendments contemplated by the (co-)legislator(s) would fundamentally alter your proposal to the point that its original *raison d'être* would be subverted.

Withdrawing the CAP proposals requires a lower threshold to be met

A good starting point for arguing in favour of a lower threshold is the Court's understanding of the role of the Commission in the legislative process. In the *MFA* judgment, the Court of Justice not only explicitly acknowledged the existence of a right to withdraw legislative proposals – it also rejected the 'honest broker' reading of the role of the Commission proposed by the Council (see point 27 of the AG's Opinion in C-409/13). In paragraph 74 of the ruling, the Court stated that 'the Commission's power under the ordinary legislative procedure does not come down to submitting a proposal and, subsequently, promoting contact and seeking to reconcile the positions of the Parliament and the Council'. As argued earlier, this can be seen as a defence of the Community Method and of the role of the Commission within it. This broad understanding of the Commission's position in the legislative process stands in clear contrast to the view presented by the five MEPs in the CAP case that 'the role of the Commission must be to facilitate an agreement between the parties and not push its own political priorities', and serves as the background for arguing in favour of lower thresholds in our case.

According to the Court, one of the key reasons for reading the Commission's power broadly is that the latter institution has the fundamental task of promoting the 'general interest' of the Union (Article 17), also when it comes to the legislative process. The general interest of the Union will normally be promoted by initiating new legislation, but again, in limited circumstances, might also call for *withdrawing* legislative proposals. This is the case when, as in *MFA*, amendments of the legislators have disrupted the *raison d'être* of the original proposal. But it may also be the case when the Commission reassesses the legal and political context and considers that the proposal no longer contributes to pursuing the

general interest of the Union. Even if the *raison d'être* of the proposal is not at stake, the fact that the circumstances surrounding the proposals have changed could therefore constitute an 'objective need' and justify the decision to withdraw. The Commission's argument could therefore be that the current CAP proposal does not promote the 'general interest' any longer, as it (allegedly) conflicts with the environmental objectives defined in the European Green deal. The need to ensure consistency between policy areas can also be considered part and parcel of the Commission's duty to promote the Union's general interest, and further supports a lower threshold for withdrawal in the circumstances we are discussing.

Furthermore, one should be mindful of the institutional background to the dispute. The original proposal was presented by the previous Commission, the Juncker Commission. While the von der Leyen Commission first endorsed the initiative for reasons of institutional continuity, it should arguably be allowed to rethink and realign its priorities, even when this might upset the legislators. In general, it seems appropriate to leave the Commission room for even more political considerations when what is at stake is a proposal presented in a different term, also taking into account the broader trends towards a 'politicisation' of the European Commission that have emerged more clearly in at least the last decade. This understanding would also support lower thresholds in the current case.

A final aspect that distinguishes the CAP scenario from the *MFA* case, and calls for a lower standard, is that the decision to withdraw would be taken at a different and earlier stage of the legislative process. In *MFA*, the Parliament and the Council of the EU had already reached an informal agreement on the final text of the regulation under discussion. A Commission decision to withdraw the proposal at that stage of the process should rightly be seen as exceptional, also in view of the democratic concerns presented earlier. In the CAP case, negotiations are still ongoing, and a Commission decision to withdraw the proposal (and introduce a new one) would not amount to subverting a compromise between institutions, but would only modify the starting point of those negotiations. In other words, it is arguable that the democratic concerns would not be felt as strongly in the CAP scenario.

Conclusion

In the previous sections, we have presented two different views on the thresholds that should apply to any decision to withdraw the CAP proposals. Starting from the same set of requirements, which we deduced from the *MFA* decision, we reached different conclusions on how to apply them in the concrete case, and we believe that both views are indeed at least plausible. Should the bitter political dispute between the institutions evolve into a full-scale judicial battle before the Court of Justice (something unlikely to happen), the judges in Luxembourg would have a tricky and complex case in front of them.

More broadly, cases like this raise more fundamental questions of a true constitutional nature, as Advocate General Jääskinen correctly pointed out in the *MFA* case. They make us reflect on the position of the Commission in the EU

legislative process and more broadly in the EU institutional balance. They also call into question the right balance between the democratic principle established in Article 10(2) TEU and the more 'functionalist', if not technocratic, idea of the Community Method reflected in Article 17(2) TEU, and crucially in the Commission's (almost) monopoly on presenting legislative proposals. Both are prerequisites for the EU to function, but the right balance between the two remains an open question. The Court did not fully answer these fundamental questions in its *MFA* decision – perhaps for good measure – but they are bound to reach Luxembourg again sooner or later.

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